Investment Funds Performance Reports

Disclosure – Company Information

Instruction No. 306 modifies, among other things, how the publication of the detailed report of the performance of the securities investment funds must be done. It establishes that the Administrators of the investment funds must inform investors about the involved risks as well as explain that the results obtained by the fund in the past (track record) cannot guarantee the future financial performances of the fund.

Instruction No. 306 revokes Instruction No. 82, of 19 September 1988, Instruction No. 94, of 4 January 1989 and Instruction No. 231, of 16 January 1995, all issued by the Brazilian SEC.

(SEC - Instruction No. 306, of 5 May 1999)

Walter Douglas Stuber and
Henrique B. Filizzola
Amaro, Stuber e Advogados Associados

Uruguay

Amendment to Depreciation Provision

Tax – Depreciation

Following the passing of Decree 277/98, the Executive Branch has allowed manufacturing, extractive and agribusiness entities, the right to accelerate depreciation. This Decree was passed within the legal framework for the promotion and protection of foreign investments in Uruguay, as regulated under Law 16,906.

According with the above-mentioned Decree, those entities subject to commercial or agribusiness income tax may choose to accelerate the depreciation of movable goods (industrial and agricultural machinery, industrial facilities and trucks) used for production, or electronic data processing equipment (excluding software), incorporated between 1 October 1998 and 31 December 2000. The term of accelerated depreciation may be of two or three years, as the taxpayer may choose. Upon making the decision of which term to use, the term may be thereafter modified, within the parameters defined in the mentioned Decree, only with the express authorisation of the Uruguayan tax authority (DGI).

Hector B Viana
Estudio Hector A Viana

North America

United States of America – Delaware

Case Law
'Entire Fairness' Ruling

Remedies for Maladministration; Directors' Duties – Fiduciary Duties, Duties of Good Faith and Loyalty; Entire Fairness Standard; Shareholders

The Delaware Supreme Court recently reversed a Court of Chancery opinion granting summary judgment in dismissing the plaintiff's 'entire fairness' and disclosure claims.

Factual and Procedural Background

The Plaintiff, a stockholder of May Petroleum, Inc. ('May'), challenged the merger of May and a number of corporations owned by Craig Hall, the Chairman and Chief Executive Officer, and majority stockholder of May, pursuant to which Hall's ownership of May would be increased from 52.4% to 73.5% of May's outstanding common stock. The Plaintiff named as defendants the five members of the May board of directors (three of whom were 'outside' directors), May and, ultimately, Hall Financial Group, Ltd.

After various preliminary decisions, the Court of Chancery granted summary judgment dismissing all the claims (*Emerald Partners v Berlin*, Del. Ch., CA No. 9700, Steele, VC (22 September 1995) ('*Emerald I*'); *Emerald Partners v Berlin*, Del. Ch., 712 A.2d 1006 (1997) ('*Emerald II*'); *Emerald Partners v Berlin*, Del. Ch., CA No. 9700, Steele, VC (3 August 1998) ('*Emerald III*')).

Legal Analysis

The Supreme Court began its analysis with a review of the allegations of the complaint and concluded that, 'Emerald Partners has made a sufficient showing through factual allegations that entire fairness should be the standard by which the directors' actions are reviewed,' thus shifting 'to the director defendants the burden to establish that the challenged transaction was entirely fair'.[1] In concluding that the entire fairness was the appropriate standard of review, the Court pointed to, among other things, 'the circumstances attendant upon

[1] Op. at 11.

the events leading to the negotiation of the merger,' including the fact that Hall 'clearly stood on both sides of the transaction' and owned a majority of May's outstanding common stock.[2] The Court also noted that the Court of Chancery acknowledged that the plaintiff had cited facts in its complaint and briefs that 'might raise a question as to the judgment and care of the defendant directors' regarding proxy statement disclosure decisions connected with the merger.[3]

Next, the Court criticised the Court of Chancery for examining plaintiff's disclosure claims standing alone, rather than as particle of plaintiff's entire fairness claim, concluding that 'that the entire fairness and disclosure claims under these circumstances were intertwined and should not have been considered separately.'[4] The Supreme Court found that the Court of Chancery erroneously focused 'on the statutory protection available to the directors in the context of due care claims' instead of deciding the materiality of the alleged proxy statement misstatements or omissions.[5] The Supreme Court concluded that the disclosure claims alleged by plaintiff should not have been categorised as due care claims.

The Supreme Court noted, 'for the guidance of the Court of Chancery and the parties, that the shield from liability provided by a certificate of incorporation provision adopted pursuant to 8 Del. C. § 102(b)(7) is in the nature of an affirmative defence' and that defendants 'seeking exculpation under such a provision will normally bear the burden of establishing each of its elements'.[6] The Supreme Court held that the Court of Chancery incorrectly ruled that plaintiff was required to establish at trial that the individual defendants acted in bad faith or in breach of their duty of loyalty. Instead, the Supreme Court held that 'the burden of demonstrating good faith, however slight it might be in given circumstances, is upon the party seeking the protection of the statute'.[7] However, the Court noted that 'where the factual basis for a claim solely implicates a violation of the duty of care, this Court has indicated that the protections of such a charter provision may properly be invoked and applied.'

Note

In *Green v Phillips-Van Heusen Corp.* (Del. Ch., CA No. 14436, Jacobs, VC 5 May 1999) the Delaware Court of Chancery denied a motion to reconsider the Court's previous dismissal of a stockholder class action in light of the Delaware Supreme Court's decision in *Emerald Partners v Berlin* (as discussed above). The Court held that the plaintiff's motion for reconsideration was 'predicated upon [an] overly expansive reading of *Emerald Partners*.'[8] The Court found that *Emerald Partners* 'does not hold (as the plaintiff contended) that a s 102(b)(7) provision can never be the basis for a motion to dismiss at the pleading stage regardless of the violation alleged.' Rather, the Supreme Court in *Emerald* 'explicitly noted that its holding will not prevent the dismissal of breach of fiduciary duty claims where 'the factual basis for [the] claims *solely* implicates a violation of the duty of care . . .'.

Here, the Court noted that it had previously held that the claim against the individual defendants was of that character, 'because the complaint contained no allegations that those defendants either were financially interested, or that in approving the challenged agreement they acted in other than good faith.' Op. at 2-3.

Emerald Partners v Berlin, Del. Supr., No. 393, 1998, Walsh, J. (16 March 1999)

William M. Lafferty
Morris, Nichols, Arsht & Tunnell
Wilmington

[2]Op. at 10-11.
[3]Op. at 11.
[4]Op. at 12.
[5]Op. at 15.
[6]Op. at 15–16.
[7]Op. at 16.
[8]Op. at 2.